No. 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

M. CLAUDE SCREWS, FRANK EDWARD JONES and JIM BOB KELLEY, PETITIONERS

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The judgment of the United States District Court for the Middle District of Georgia overruling petitioners' demurrers to counts 2 and 3 of the indictment (R. 24) and its judgment overruling petitioners' motion for a directed verdict (R. 166, 194) are not reported. The opinion of the Circuit Court of Appeals (R. 217-227) is reported in 140 F. (2d) 662.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 14, 1944 (R. 227) and the order denying a rehearing was entered February 18, 1944 (R. 232). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court of the United States had jurisdiction to try state arresting officer and his deputies for the offense of killing a person (who was in their custody) in violation of state laws and state regulations and without the sanction of the state or a subdivision thereof.

STATUTE INVOLVED

The key statute involved is Sec. 52 of Title 18 U. S. C. Criminal Code, Sec. 20; Revised Statute 5510; 35 Stat. 1092, and will be found in the Appendix, *infra*, p. 19.

STATEMENT

Petitioners were indicted at the October Term 1942 by a United States Grand Jury at Macon, Georgia (R. 2) on three counts. The first count charged a violation of Sec. 51 of Title 18 U. S. C.; the second count charged a violation of Sec. 52 of this title, and the third count charged a conspiracy to violate Sec. 52. The allegations of count 2 were substantially: That petitioners (who were state arresting officers) deprived a Negro citizen and an inhabitant of the State of Georgia and of the United States of certain rights and privileges granted and secured to him by the 14th Amendment to the Consti-

tution of the United States for that petitioners arrested said Negro and brought him to a place near the court house at Newton, Georgia, where petitioners unlawfully and wrongfully struck and beat said Negro in such a manner as to cause his death. Count 3 alleged a conspiracy to violate Sec. 52.

Petitioners filed their demurrers to the indictment (R. 15) on the primary grounds that the matters and things set forth and charged in the several counts did not constitute offenses against the laws of the United States and that the United States District Court did not have jurisdiction to try petitioners for the alleged offenses. The court sustained the demurrers to count 1 and overruled the demurrers to counts 2 and 3 (R. 24), upon which petitioners were tried and convicted.

The pertinent facts, as disclosed by the evidence, are substantially as follows:

That early in the evening on which Hall (the victim) was killed, Sheriff Screws received a warrant for his arrest; that the warrant was not immediately served as the Sheriff was busy on other matters; that just before midnight Jones and Kelley went to the office of the Sheriff who asked them to use his automobile in serving the warrant on Hall; that pursuant to this request Jones and Kelley arrested Hall and brought him to Newton, Georgia, where they found the Sheriff standing near the court house square; that when the automobile was stopped, the Sheriff opened the door thereof and told Hall to get out; that Hall stepped out of the automobile with a shot gun in his hand and began to use threats and opprobrious words while resisting arrest; that the Sheriff

(being in fear of his life and safety) began to hit Hall with his fist and told Jones to hit him with his blackjack; that after Hall was subdued he was locked in jail by Jones and Kelley; that shortly thereafter the Sheriff inquired as to the physical condition of Hall and upon learning that it was critical, called for an ambulance and medical assistance; that Hall died soon after reaching the hospital; that there was "bad blood" and ill feeling between Sheriff Screws and the deceased; that a pistol which had previously been taken away from Hall by Jones while he was acting as policeman of the City of Newton, Georgia, was turned over to Sheriff Screws, who refused to return it to Hall without an order of court (R. 68); that Hall appeared before the Grand Jury of Baker County and sought to obtain the pistol from the Sheriff (R. 41); that when Hall failed to get any relief from the Grand Jury (as it had no authority in the matter) he caused a letter to be written to the Sheriff by a lawyer seeking to regain possession of the pistol (R. 194); that on the day Sheriff Screws received the letter he and the other petitioners became intoxicated and were intoxicated at the time Hall was arrested and killed.

No evidence was introduced that petitioners or either of them acted under color of any particular law or under any statute, ordinance, regulation or custom of the State of Georgia or a subdivision thereof in taking the life of Hall. It was stipulated that Screws was Sheriff of Baker County and that Jones was a policeman of the City of Newton. No race discrimination was proved. The Government contended that the taking of life of Hall (even though contrary to State law and even though unauthorized by the State or a subdivision thereof) was *pro tanto* the act of the State.

At the conclusion of all the evidence petitioners (defendants in trial court) moved for a directed verdict upon grounds substantially the same as those raised by their demurrers, to-wit, that the court did not have jurisdiction to try petitioners for the offenses charged and as proved. This motion was overruled (R. 166, 194). Petitioners were sentenced to pay a fine of $1,000.00 each and to serve three years in prison (R. 11, 12, 14).

Upon appeal by petitioners to the Circuit Court of Appeals for the Fifth Circuit the judgment of the Court below was affirmed (R. 227). Sibley, Circuit Judge, dissented (R. 223). The court, in deciding that the court below had jurisdiction, held, in effect, that even though the officers did not act under any particular statute of the State or of the City of Newton, that they were acting "under color of law" merely because they were acting by virtue of their offices: that the act of a state officer is *pro tanto* the act of the State.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court of the United States had jurisdiction under Sec. 52 of Title 18 U. S. C., to try state arresting officers for the offense of killing a prisoner contrary to state laws and without the sanction of the State or of any subdivision thereof.

2. In holding that the United States District Court had jurisdiction to try state arresting officers under Sec. 88 of Title 18 U. S. C. for a conspiracy to arrest and kill a citizen contrary to state laws and without authority or sanction of any law of the State or of any subdivision thereof.

3. In holding that the violation of a state law by a state arresting officer was a violation of a federal right.

4. In holding that the act of a state officer contrary to state law and without authority of state law or of the law of any subdivision thereof, was *pro tanto* state action.

5. In holding that the 14th Amendment to the Constitution of the United States secures the fundamental rights of life and liberty against the acts of State officers, even though such acts be contrary to State law, and without the sanction of any law or custom.

6. In holding that the wrongful and illegal beating of a prisoner by a state arresting officer, acting under a warrant, whether void or valid, is an unlawful deprivation of a right of a citizen of the United States which the 14th Amendment protects and which Sec. 52 makes a criminal offense.

7. In not reversing the judgment of the District Court.

ARGUMENT

I.

Manifestly the United States District Court did not have jurisdiction to try petitioners for the offenses charged. Hall was not killed under authority of the State. It is not contended that petitioners acted under authority of any law, statute, ordinance, regulation or custom, but it is contended that they acted under "color of law" for that the act of a state officer is *pro tanto* the act of the State.

Sec. 52 (of Title 18 U. S. C.) is an ancient statute, yet it has never been construed by this Court when applied to

a similar state of facts as presented herein. However, there is no doubt that the decision of the Circuit Court of Appeals is in conflict with numerous decisions of this Court involving analogous questions.

This Court said in a fairly early case:

> "The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the government.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself."

U. S. Cruikshank, 92 U. S. 553.

In a slightly later case this Court held:

> "But when a *subordinate officer* of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar; it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced." (Italics ours.)

Virginia v. *Rives*, 100 U. S. 321.

In a much more recent case this Court held:

> "The Fourteenth and Fifteenth Amendments operate solely on state action and not on individual action. Unless the Thirteenth Amendment vests jurisdiction in the National Government, the remedy for wrongs committed by individuals on persons of African descent is through state action and state tribunals, subject to supervision of this court by writ of error in proper cases."

Hodges v. *U. S.*, 203 U. S. 1.

In a case very much in point this Court held:

> "Where the jurisdiction of the Circuit Court is invoked on the ground of deprivation of property without due process of law in violation of the Fourteenth Amendment, it must appear at the outset that the alleged deprivation was by act of the State.
>
> "And where it appeared on the face of plaintiff's own statement of his case that the act complained of was not only *unauthorized* but was *forbidden* by the state legislation in question, the circuit court rightly declined to proceed further and dismissed the suit." (Italics ours.)

Barney v. *City of New York*, 193 U. S. 430.

This Court has also held:

> "Under 641, 642, Rev. Stat., there is no right of removal into the Circuit Court of the trial of a person indicted under the state law where the alleged discrimination against the accused in respect to his equal rights, is due merely to illegal or corrupt acts of administrative officers *unauthorized* by the constitution or laws of the State as interpreted by its highest court. The remedy for wrongs of that char-

acter is in the state court, and ultimately in this court by writ of error to protect any right secured or granted to the accused by the Constitution or laws of the United States and which has been denied to him in the highest court of the State in which the decision in respect to that right can be had." (Italics ours.)

Kentucky v. *Powers*, 201 U. S. 1.

This Court in a very recent case affirmed the decision of the Circuit Court of Appeals for the Seventh Circuit wherein it was said "that the action of the members of the State Board, being contrary to State law, was not State action and was therefore not within the provisions of the 14th Amendment."

Snowden v. *Hughes*, No. 57, Oct. Term 1943, decided Jan. 17, 1944 (64 S. Ct. 397).

The officers in the instant case did not deny the victim, Robert Hall, any rights granted or secured to him by the 14th Amendment to the Constitution of the United States unless their acts amounted to State action, for it is clear that this amendment is an inhibition against State action and not against individual action.

Hodges v. *U. S.*, *supra* (203 U. S. 1).

Another well considered case is

Civil Rights Cases, 109 U. S. 17.

In the case of

Hunnington v. *City of New York*, 118 F. 683 (2)

a Circuit Court of New York said:

> "Trespasses on the property rights of an individual, committed by public officers or agents professedly acting under authority of a state law, but which are not only not authorized by such law, but, by a fair construction of it are prohibited, cannot be imputed to the state so as to bring them within the constitutional inhibition to deprive persons of property without due process of law, and on that ground to confer jurisdiction on a federal court to grant relief."

That case was affirmed by this Court, 193 U. S. 441.

An arresting officer is not an executive, legislative or judicial officer. He cannot act for the State unless he be authorized by law. His authority is well defined and when he exceeds this authority his action cannot be said to be sanctioned by the State.

Before further discussing the Federal cases it might be well to comment on the fact that nowhere in the legal encyclopaedias is there any hint that the Federal Government has any such right (as is claimed in this indictment) to take over the administration of state criminal laws.

For instance in 11 C. J. p. 802 it is said:

> "This amendment (14th) does not cover new rights nor regulate old ones but only extends the operation of those already existing and furnishes an additional guaranty against encroachment on them by the States; its inhibitions are directed to State action and apply to all the instrumentalities and agencies employed in the administration of State government and not to the action of private individuals."

And it is further stated on same page:

> "The privileges and immunities guaranteed by these amendments to the Constitution and which the States are forbidden to deny or abridge are those which depend immediately on the constitution of the United States, which belong to citizens of the United States in that relation and character, and which the Federal courts have jurisdiction to protect, and not such rights as accrue from state citizenship."

The rights protected by the States, as distinct from those protected by the United States, are illustrated in the notes to the citation. The fundamental rights, the enjoyment of life and liberty, the right to acquire and possess property and to pursue happiness and safety belong to the States, but the specific federal rights are comparatively few in number and are specifically enumerated.

In 14 C. J. S., Sec. 3, p. 1161, it is said:

> "Under the Fourteenth Amendment the legislation must necessarily be, and can only be, corrective in its character, addressed to counteract and to afford relief against state regulations or proceedings. A similar view has been taken in respect of the Fifteenth Amendment. The Fourteenth Amendment does not empower Congress to legislate on matters within the domain of state legislation, nor to legislate against the wrongs and personal action of citizens within the states, nor to regulate and control the conduct of private citizens. Hence an enactment which exceeds the limits of corrective legislation and inflicts penalties for the violation of rights belonging to citizens of the state as distinguished from citizens of the United States is not authorized by such

amendment, so far as its operation within the states is concerned."

In 11 Am. Jur., p. 556, discussing this statute, it is said:

> "The protection afforded is against an invasion only of rights that are secured by the Federal Constitution or statutes and not others; rights and privileges dependent upon state laws are not protected."

Again discussing Federal authorities, there are several decisions upon which the Government relies to support its contentions.

One of the cases is

Ex Parte Virginia, 100 U. S. 339, 369

This case is easily distinguishable from the case at bar for that the privileges denied to the petitioner were granted and secured to him by the Constitution and laws of the United States, to-wit, the right to serve as a grand or petit juror. The act construed in the ***Ex Parte Virginia*** case was approved March 1, 1875 (18 Stat., part 3, 336). That section is now codified in Sec. 44 of Title 18, U. S. C. A., and the act expressly prohibits "Any officer or other person charged with any duty in the selection or summoning of jurors" from excluding or failing to summon any citizen because of his race, color or previous condition of servitude. Another distinction is that it was regarded as the final judgment of a state court.

Another case is

Hague v. *Committee, etc.*, 101 F. (2d) 774

This decision was affirmed by the Supreme Court, as modified.

Hague v. *Committee*, 307 U. S. 496

However, this Court did not construe Sec. 52 of Title 18 and the decision does not support the contention of the Government in the instant case. The complainants in the Hague case alleged that the officials of Jersey City had adopted and enforced a deliberate policy of preventing its citizens from communicating their views respecting The National Labor Relations Act. Also, the officers of Jersey City were purporting to act under authority of a city ordinance, though it was later declared void.

The Government contends that the case of

United States v. *Classic*, 313 U. S. 299

is conclusive on the issues involved in the instant case. This is an erroneous contention. The court expressly stated at page 329 of its opinion:

> "We do not discuss the application of Sec. 20 (Sec. 52, 18 U. S. C. A.) to deprivations of the right to equal protection of the laws guaranteed by the Fourteenth Amendment, a point apparently raised and discussed for the first time in the Government's brief in this Court. The point was not specially considered or decided by the court below, and has not been assigned as error by the Government. Since the indictment on its face does not purport to charge a deprivation of equal protection to voters or candidates, we are not called upon to construe the indictment in order to raise a question of statutory validity or construction which we are alone authorized to review upon this appeal."

The Court construed Section 52 as giving protection to rights and privileges secured by the Constitution of the United States but the rights and privileges discussed in the Classic case were those granted and secured by Article I, Section 2 of the Constitution and not those granted or secured by the Fourteenth Amendment.

Mr. Justice Stone is construing this section of the Constitution said (at p. 315):

> "And since the constitutional command is without restriction or limitation the right, unlike those guaranteed by the 14th and 15th Amendments, is secured against the action of individuals, as well as of states."

This Court held that Section 52 was enacted for the purpose of protecting any right or privilege granted or secured by the Constitution or laws of the United States or by any amendments to the Constitution. This section (52) is applicable to redress wrongs committed by individuals where the Constitution puts a limitation on individual acts. The section is applicable to redress wrongs which infringe rights and privileges granted and secured by the Fourteenth Amendment to the Constitution but the Fourteenth Amendment is an inhibition on State action and is not a limitation on individual action.

It is true that the Court (at pages 325-326) said:

> "The right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution, and to this Sec. 20 also gives protection. The alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the re-

sult of the count, and to certify the results of the election. Misuse of power, possessed by virtue of state law and made possible *only* because the wrongdoer is clothed *with the authority of state law,* is action taken under color of state law." (Italics ours.)

There is a clear distinction between the Classic case and the case at bar. The officers, holding the election in Louisiana, were authorized by law to count the ballots, and to record and certify the results. Necessarily any act in connection with the holding of the election was done "under color of" law, for they were acting under a state statute. They were authorized by law to hold the election. On the other hand, petitioners were not authorized to inflict any punishment on the deceased and the acts charged in the indictment were not committed "under color of" state law and, therefore, the federal court does not have jurisdiction of the offenses charged. The defendants could have committed the same acts regardless of whether they were officers or individuals. They did not act pursuant to law, but acted contrary thereto.

Another case is

Home Tel. & Tel. Co. v. *Los Angeles* 227 U. S. 278

This case is clearly not in point for that the officers acted pursuant to and under authority of a municipal ordinance of the City of Los Angeles.

The distinction is aptly illustrated by a decision of the Supreme Court of Texas.

"A proceeding indisputably not by way of attempt to comply with an existing law cannot by any stretch

of construction be held to be had under color of law."

Hunt v. *Atkinson* 12 S. W. (2) 142, 145

Congress does not have the constitutional power to confer jurisdiction on federal courts to punish offenses of the character as alleged and as proved in the instant case.

The Court in the case of

U. S. v. *Harris*, 106 U. S. 629

held Section 5519 R. S. unconstitutional. This unconstitutional section "was framed to protect from invasion by private persons the equal privileges and immunities under the laws, of all persons and classes of persons." The Supreme Court discussed the Thirteenth, Fourteenth and Fifteenth Amendments and held that Section 5519 was unconstitutional and void because it had no reference to State action but attempted to confer upon the United States control over the administration of laws protecting persons and property in all the States, regardless of color and regardless of the question of unlawful servitude. The Harris case reviews several cases, including the Slaughterhouse cases, 16 Wall, 36, *U. S. v. Cruikshank*, *supra*, and *Virginia v. Rives*, 100 U. S. 313.

Of course, homicide and the destruction of property by state officers contrary to state law, deserve punishment, but the federal courts do not have jurisdiction of such cases.

II.

Count 3 of the indictment is based on a peculiar com-

bination of Sec. 88 of Title 18 U. S. C. (Criminal Code 37), and Sec. 52 of this title.

Section 88 is another ancient act, enacted in 1879. We have searched in vain for any case holding that there can be a conspiracy punishable under this section unless it is a conspiracy to commit an offense *against the United States* or unless it is a conspiracy to defraud the United States. The gist of the crime is the conspiracy and, contrary to the common law conspiracy, there must be an overt act committed in order to make the statutory conspiracy effective.

There is no Federal common law, and hence the only Federal offense that can be prosecuted by the United States must be statutory, except that the court may protect its own jurisdiction and punish for contempt.

United States v. *Hudson*, 7 Cranch 32; 3 L. Ed. 259

In

United States v. *Eaton*, 144 U. S. 677, 36 L. Ed. 591

it was held that there are no common law offenses against the United States and that an offense which may be the subject of criminal procedure is an act committed or omitted in violation of a public law either forbidding or commanding it, hence it was held that one could not be convicted of a mere departmental regulation requiring the keeping of certain records without naming penalties.

This rule that the statute requires the object of the

conspiracy to be an offense against the United States and that such an offense must necessarily be statutory because there is no common law offense against the United States is again laid down in

Gebardi v. United States, 287 U. S. 112, 77 L. Ed. 63, 84 AL R 370, 374.

Summing up, it is our contention that no crime is charged in Count 3. No right or privilege that can be protected directly by criminal action in the Federal Court under the 14th amendment is set up, but the specific offenses charged are assault and battery and other alleged crimes which the State Constitution and laws specifically protects.

To uphold Federal jurisdiction in this case is to establish a precedent under which the complete supervision of the administration of the criminal laws of the state by state officers would be thrust upon the already overburdened federal courts.

We respectfully submit that the contention of the Government is utterly unsound. To contend that the acts of an arresting officer (which are in violation of law) are under "color of law" merely because of his "badge" is too slender a thread to stand the test of sound juridical reason and logic. The law and facts demand a reversal.

Respectfully submitted,

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APPENDIX

Section 52 of Title 18 U. S. C., Criminal Code, Sec. 20, provides:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both. (R. S. 5510; Mar. 4, 1909, c. 321, 20, 35 Stat. 1092.)"